No. 6962

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

SHELL OIL COMPANY, a California corporation,
Appellant,

—vs.—

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,
Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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STATEMENT OF THE CASE

This is an appeal from a decree granting a mandatory injunction compelling specific performance of a contract to deliver gasoline. Appellant is an oil company, dealing generally in the manufacture and marketing of gasoline and other petroleum products on the Pacific Coast. Appellee is a jobber engaged in the business of buying gasoline from appellant wholesale and selling it to dealers.

On November 25, 1929, appellant and appellee entered into a written contract wherein and whereby appellant agreed to sell to appellee and appellee agreed to buy from appellant (R. 181):

> "All the gasoline for use and resale in the City of Seattle and its immediate and adjacent suburbs, which the Petroleum Company requires and deals in, said quantity not to be less than 1,200,000 gallons, nor more than 4,000,000 gallons in any one year, reckoning from December 15, 1929, and not less than 100,000 gallons, nor more than 400,000 gallons for any one month, reckoning from December 15, 1929, said quantities to be bought, received and paid for by the Petroleum Company in a month or year as the case may be."

The contract also provided that (R. 184):

> "All gasoline is to be paid for in cash at the time of delivery."

It also provided that either party might terminate and cancel the same on twelve months' notice to the other party (R. 187). Twelve months' notice of cancellation was given by appellant to appellee on February 28, 1932, so that the contaact will expire on February 28, 1933 (R. 137).

The parties dealt under this contract, substantial quantities of gasoline being sold and purchased by them respectively. On or about July 2, 1932, the appellant commenced the sale in limited quantities and under special circumstances of a cheap grade of gasoline popularly known as "Green Streak" or "Third Structure" gasoline. The appellant declined to sell and deliver this cheap grade of gasoline to appellee contending that it did not come within the contract. The contract provided with reference to the product covered by it as follows (R. 182):

> "It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the

Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

"It being further understood that the word 'gasoline' as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude all special refined or blended gasolines sold by it for special purposes at an increased price or prices."

It is the contention of the appellant:

1. That the product does not come within the contract in that Green Streak is not Shell gasoline of the quality the appellant is selling to its "dealer trade" *generally* in Seattle, Washington, and in that it is not gasoline of the character *ordinarily* sold by it to "Service Station Operators," and

2. That even if the product be within the contract it was not a proper case for the issuance of a mandatory injunction to compel specific performance of the contract.

Inasmuch as the first point involves largely a discussion of the evidence in detail, we will postpone a further statement of the case to the discussion under Heading I of this brief.

SPECIFICATIONS OF ERROR

The Learned Trial Court erred in:

1. Entering a decree in favor of appellee (Ass'ts I and LI; R. 81, 114).

2. Granting specific performance of the contract (Ass'ts I and LI; R. 81, 114).

3. Issuing a mandatory injunction (Ass'ts I and LI; R. 81, 114).

4. Finding as a Fact or Conclusion as a matter of law that:

(a) Green Streak was supplied to the trade (Ass't XXII; R. 95, 47).

(b) That no applications for Green Streak were denied (Ass't XXIII; R. 95, 47).

(c) The waiver required by appellant before a party could obtain Green Streak was immaterial (Ass't XXIV; R. 95, 47).

(d) The rule of ejusdem generis controls the meaning of the contract (Ass'ts XXV and XXVI; R. 96, 47).

(e) Shell Service, Inc., is a distinct entity and furnishing of Green Streak to it is a furnishing to a third party (Ass't XXVII; R. 97, 48).

(f) Appellee was a large company, built at a large expense and is of great value (Ass't XXIX; R. 98, 49).

(g) It was necessary for appellee to have Green Streak in order to meet competition (Ass't XXX; R. 99, 50).

(h) Appellee had outstanding contracts to supply Green Streak which it could not renew (Ass't XXXI; R. 99, 50).

(i) Appellee has practically exhausted its reserves and would have ceased operation in two weeks (Ass't XXXII; R. 100, 50).

(j) Plaintiff's legal remedy is not adequate (Ass'ts XXXIV and XXXV; R. 101, 51).

(k) Appellant should specifically perform (Ass't XXXVI; R. 102, 52).

5. Refusing to find that:

(a) The delivery of Super Shell and Shell Ethyl to appellee was with the knowledge on the appellee's part that he could not require it under the contract (Ass't XXXIX; R. 104, 135, 56).

(b) As follows (Ass't XLI; R. 107, 56):

"That on or about July 1, 1932, the defendant manufactured a grade of gasoline cheaper and inferior than and to the brand of gasoline known as 'Shell 3-energy,' which said cheap and inferior grade of gasoline was and is known as 'Green Streak;' that the said brand of gasoline was manufactured for a special purpose, to-wit, to meet the competition of other gasolines sold at a cheaper price than the brand of gasoline sold under the name of 'Shell 3-energy' and gasolines of other gasoline companies sold at approximately the same price as 'Shell 3-energy;' that defendant did not market and distribute, and is not marketing and distributing, the same generally to its dealer trade in Seattle, Washington, nor on the Pacific Coast, nor was it, nor is it, of the character ordinarily sold by defendant to service station operators for motor vehicle operation in Seattle, Washington, or on the Pacific Coast; that the defendant, at the time of the trial of the above entitled cause, had in the City of Seattle approximately forty-eight (48) split pump dealers, otherwise known as dealers who handle petroleum products including gasoline of other oil companies to which the defendant has refused, and continues to refuse, to sell the said 'Green Streak' gasoline, and the said split pump dealers cannot procure the same from the defendant; that the defendant had, at the time of the trial of the above entitled cause, approximately one hundred twenty-two (122) dealers in the City of Seattle handling Shell products exclusively known as 100% dealers, to only forty-eight (48) of whom the Shell Oil Company sold and delivered 'Green Streak' gasoline, and refused to sell and deliver the same to any of the other exclusive or 100% dealers, and the said other exclusive and 100% dealers could not procure the same from the Shell Oil Company; that before the Shell Oil Company would sell the said 'Green Streak' gasoline to said exclusive or 100% dealers, the defendant did require the said dealers to sign an acknowledgment, if the

said dealers were buying gasoline from the defendant by contract, that, (1) If any 'Green Streak' gasoline were delivered to them, it should be deemed to have been delivered to them in pursuance of the contract between the dealer and the defendant; (2) That the dealer would pay cash therefor on delivery; (3) That the defendant might decline to deliver any of said gasoline at any time; and (4) That the said delivery of 'Green Streak' gasoline should not be taken into consideration in computing the amount of any rental or other periodical payment payable under the contract in effect between the defendant and such dealer; that, at the time of the trial of the above entitled cause, the defendant sold gasoline to persons or gasoline vendors having a single pump on their premises for the dispensing of gasoline, but refused to deliver to the same any 'Green Streak' gasoline, and the said single pump persons or dealers could not procure the same from the defendant."

(c) As follows (Ass't XLII; R. 109, 58):

"That the defendant has refused to deliver the said 'Green Streak' gasoline to the plaintiff, and, in so doing, the defendant has acted pursuant to the terms of the above mentioned contract between the defendant and the plaintiff, and, in so doing, did not commit a breach of the above mentioned contract between the defendant and the plaintiff."

(d) As follows (Ass't XLIII; R. 110, 58):

"That for the purpose of protecting the trade name, reputation, standing, and marketability of the product known as 'Shell 3-energy,' the defendant has refused to sell 'Green Streak' gasoline under any circumstances to, or permit the same to be obtained by, any person or operator or dealer who might sell the same under the name of 'Shell 3-energy' gasoline, or in any other way permit it to be advertised or delivered so as to prejudice the trade name, standing, and marketability of said 'Shell 3-energy' gasoline.

(e) As follows (Ass't XLIV; R. 110, 59):

"That it is not necessary for a service station operator or dealer to have for the purpose of sale 'Green Streak' gasoline in order to successfully compete or meet the competition of other dealers or of other grades of gasoline."

(f) As follows (Ass't XLV; R. 111, 59):

"That by reason of the inability of the plaintiff to procure and purchase 'Green Streak' gasoline from the defendant, the plaintiff has not lost any business nor suffered any damage and will not lose any business or suffer any damage as a consequence thereof."

(g) As follows (Ass't XLVIII; R. 113, 61):

"That the defendant has not violated any of the provisions of its contract with the plaintiff herein."

(h) As follows (Ass't XLIX; R. 113, 61):

"That the plaintiff has not sustained any damage by reason of anything done by the defendant in the performance of the contract herein."

(i) As follows (Ass't L; R. 113, 61):

"That no emergency exists and the plaintiff is not entitled to any injunctive relief directing specific performance of the contract or for any purpose."

6. Permitting the witness Mr. Polsky to testify to loss or damage sustained by reason of the refusal to deliver Green Streak (Ass'ts VI to IX inclusive; R. 86, 127, 131).

7. In permitting the witness Polsky to testify that demands had been made upon him by operators and dealers for delivery of Green Streak (Ass't X; R. 89, 132).

8. In permitting the witness Polsky to testify that he

had contracted to sell Green Streak to operators or dealers (Ass't XI; R. 89, 133).

9. Refusing to permit the witness Miller to testify concerning the sale of Green Streak on the Pacific Coast generally (Ass't XVI; R. 90, 172).

10. Refusing to permit the witness Lakin to testify to the written acknowledgments or waivers required from dealers before permitting them to buy Green Streak (Ass't XIV; R. 90, 158-9).

11. Sustaining objection to the offer of such written waivers or acknowledgments in evidence (Dft's Exhibit "A" for identification, R. 197; Ass't XV; R. 90, 159, 47, 197).

12. Refusing to permit the defendant to prove any fact under its affirmative defense (Ass't XVII; R. 90, 177-180).

13. Refusing to permit the defendant to prove complainant was in default under the contract (Ass't XVIII; R. 90, 177-180).

14. In permitting the witness Polsky to testify to threats or statements made to him by dealers and operators concerning suits for Green Streak (Ass't XIX; R. 91, 132).

Most of the Errors specified, particularly 1 to 5 inclusive, naturally fall within the discussion under Headings I and II and may be deemed grouped and treated thereunder.

The other Errors specified, and some of those included under 4 and 5 requiring special treatment, will be discussed under Heading III of this brief.

ARGUMENT

I

THE PRODUCT DOES NOT COME WITHIN THE CONTRACT

(Specifications of Error 4 and 5)

Before Green Streak can be said to come within the contract, it must meet the following tests:

1. It must be of the quality appellant is selling to its "dealer trade" *generally.*

2. It must be of the character *ordinarily* sold by appellant to "service station operators."

The evidence showed that originally the appellant marketed but one grade of gasoline, which was known as "Shell gasoline" and was its main grade of gasoline. This name was changed for advertising purposes to "Shell 61" and later to "Shell 400," as its quality improved (R.165). "Shell 400" was the only brand marketed when the contract in question was entered into (R. 123). During the existence of the contract the name of this brand again was changed and this time to "Shell 3-Energy," under which name it was being marketed at the time of the trial. However, these different brands were at all times substantially the same gasoline, except that it was improved from time to time by the Company's chemists (R. 165). But about a year after the contract was entered into the appellant commenced to market in addition a premium or better and higher grade of gasoline known as "Super-Shell" (R. 165). This gasoline was a special blend and sold for a higher price and under the contract appellant was not entitled to purchase it because it was a "special refined

or blended gasoline sold * * * at an increased price." Appellee knew this (R. 135). But the contract was orally modified and finally appellant consented to sell this gasoline to appellee on a temporary, or day to day basis (R. 135). Later the appellant discontinued the marketing of Super-Shell and supplanted it by "Shell-Ethyl," likewise a specially blended gas sold at a higher price. This gasoline was really 3-Energy combined with a product or substance of the Ethyl Corporation which owned and controlled the process of Ethylizing gasoline. It can only be handled through a license from the process patentee. The appellant had such a license but appellee did not, and was, therefore, not entitled to it, both by reason of the contract and by reason of having no license (R. 175). However, the appellant finally consented to let appellee sell it under appellant's license (R. 175, 166), under oral modification of the contract (R. 166) on a temporary day by day basis.

As the Vice-President of the Shell Oil Company said (R. 175):

> "The Independent Petroleum Company has never been granted a license to sell Ethyl, but they are selling it under our license."

and

> "We have a license and have permitted them gratuituously to buy it from us and sell it. But they are not entitled to it under their contract."

Thus up to the time Green Streak came out appellant had been marketing at all times only two grades of gasoline; the *main* grade, now known as 3-Energy, and the *premium* grade known as Shell-Ethyl (R. 136). Appellee at all times received the main grade, but got

the premium grade only after negotiations and oral modification of the contract.

The purpose in marketing Green Streak is best told in the words of the appellant's officials. Mr. E. L. Miller, Vice-President of the Shell Oil Company, residing in San Francisco, said (R. 171):

> "The reason we were putting out this third brand of gasoline was so that we would be competitive with some of our independent competitors. The sales of our Shell gasoline were going down, while the sales of independent gasoline were going up, and it was self evident we had to put a product on the market that we could market in competition with this inferior independent gasoline, and not destroy the value that we had been trying to build up for years on our Shell brand of gasoline."

Mr. Lakin, the Sales Manager for the Northern Division, embracing the states of Washington, Oregon, Montana, Idaho and the Province of British Columbia, said (R. 158-9):

> "The Company commenced to market Green Streak in the Northwest about July 2nd of this year. The purpose is this: We have Shell-Ethyl, which is distributed by ourselves, and is primarily distributed through service stations, for use in cars that require a gasoline of high anti-knock quality; as a rule, cars with high compression, 3-Energy is a gasoline that has also a high anti-knock quality, quick starting features, good mileage features. It is a balanced fuel, one that will perform in any make of automobile, and in practically any make of combustion motor, and will meet the requirements of the trade. Green Streak is an old fashioned gasoline that has indifferent starting qualities, is not high in anti-knock qualities, does not accelerate quickly and readily, and will just get by. We market Green

> Streak in order to meet competition in certain parts where gasolines are sold at a lower price."

and

> "The purpose in manufacturing Green Streak was to have gasoline available in those areas wherever gasolines were being sold at cheaper prices."

And as the Chief Chemist, brought up from Martinez, Cal., to testify at the trial, said (R. 156):

> "Instead of reducing the price of 3-Energy we reduced the quality of gasoline and get Green Streak."

However, Green Streak was a cheap product and because 3-Energy was a product with a reputation and upon which the Company had spent millions of dollars and years of effort in producing, advertising and promoting, it was deemed most important that the marketing of it should be controlled so that it could not be sold by unscrupulous dealers under the name of the higher grades of gasoline, or substitutions of it be effected, the marketing policy of the Company ruined, the name of 3-Energy prostituted and the public fooled.

Therefore, its sale was restricted. *It was not sold generally to the dealers nor ordinarily to service station operators.* As Mr. Lakin said (R. 158):

> "We do not desire to sell Green Streak; we desire to forward the sale of 3-Energy. In cases where we sell Green Streak, we sell it for cash. We sell it where we feel that competition justifies it, and where we feel we have control of the distribution of Green Streak."

and (R. 161):

> "It is entirely necessary that we handle the distribution of Green Streak carefully, otherwise it

could upset our market generally. Substitution could occur."

Before appellant would sell the gas to any dealer, the dealer was required to acknowledge in writing that (R. 158-9; Deft's Ex. "A"):

1. If he had a contract with appellant it was not to have been deemed to have been delivered in pursuance of the contract; and

2. He would pay cash; and

3. Delivery might cease at any time; and

4. Any existing contract should not be deemed applicable to the Third Structure gas; and

5. That the amount delivered should not be taken into consideration in computing rentals or payments.

And even though the dealer might be glad and willing to comply with such restrictions he would not necessarily get the gasoline (R. 161).

"Even assuming that a dealer wants this product and is willing to take it under any terms that we lay down, we will not sell it to him. There may be many cases where we did not desire to sell it. There might be certain areas where we did not desire it to be distributed. There may be certain dealers we would feel it inadvisable to give Green Streak to regardless of their willingness to meet our requirements. This is because in order to market properly, it is entirely necessary that we handle the distribution of Green Streak carefully, otherwise it could upset our market generally. Substitution could occur."

But the proof of the pudding is in the eating.

At the time of trial appellant sold gasoline generally to one hundred and twenty-two 100% dealers of Shell products and forty-eight split pump accounts (that is dealers who handles the products of other companies as

well as appellant's). *Not one of the split pump accounts was being delivered Green Streak and they could not get it.* Only forty-eight out of the one hundred and twenty-two 100% accounts were buying or could buy Green Streak from appellant. Hence out of one hundred seventy regular dealers in the territory covered by the contract, only forty-eight could purchase and handle the product (R. 160-174). Mr. Lakin said (R. 161-2):

> "We do not sell Green Streak gasoline generally to our dealers. In the Seattle area, which includes Richmond Beach, and which is the area in which the Independent Petroleum operates, about 28% of our dealers purchase Green Streak. We do not sell it to any of the split pump accounts. We do sell it to some of the 100% dealers."

Nor could a dealer with only one pump purchase the product (R. 165).

Appellee placed on the stand several independent dealers who were buying Green Streak from appellant, but every one of them admitted that he had to sign an acknowledgment required by appellant before he could get the product, and pay cash for it (R. 143-152).

Much capital was made by appellee at the time of trial of the fact that appellant was selling Green Streak directly to the consumer on the street and highway. That is true. Through its retail department, Shell Service, Inc., appellant did sell direct to the consumer but this was not a selling of the gasoline to its "dealer trade" or to "service station operators," which was the only selling denominated by the contract as a test of whether the product came within the contract.

The Service Station, Inc., stations were the Company's own stations and not dealer stations.

Appellee called Mr. Dietz to the stand, manager of those stations, who testified (R. 143):

> "I am collection manager of the retail department of the Shell Oil Company or Shell Service, Inc. There is no difference between Shell Service, Inc., and Shell Oil Company. It is all one. I operate 31 service stations in Seattle."

and

> "These stations which I mention are not dealer's stations of the Shell Oil Co. They are simply retail stations of the Shell Oil Company and the handling of gasoline there is simply a bookkeeping proposition."

E. L. Miller, Vice-President of the Shell Oil Co., and President of Shell Service, Inc., said (R. 172):

> "Shell Service, Inc., stations are not dealers' stations. They are stations that are owned by the Shell Oil Company and operated as the Shell Oil Company's retail outlet and for the purpose of convenience we operate them under the name of Shell Service, Inc. The major portion of the buildings are owned, the ground on some of them we own, and some we lease. In some instances we lease a going station and put it under the Shell Service, Inc., chain. The Shell Service, Inc., is a department just the same as a lubricating or a fuel oil department. The supervisors for and managers for Shell Service, Inc., receive their salary each month from the Shell Oil Company on Shell Oil Company's checks. They are all the same concern, owned by the same parties and same interests but handled for convenience under different names."

Green Streak was sold by the appellant through its retail department to the consumer direct because (R. 164):

> "The Green Streak that is located in the Company stations, owned and controlled, is directly under our control, which is the only manner in which we can allow Green Streak to prevail."

Therefore, can it be said that there was a selling by appellant of Green Streak *generally* to its "dealer trade" or that Green Streak was of the character *ordinarily* sold to "service station operators" when in the area covered by the contract not one single pump dealer or operator had it, or could buy it, not one split pump dealer or operator had it or could buy it, and of the one hundred twenty-two 100% dealers or operators only forty-eight had it and could get it, and they were obliged to acknowledge certain limitations and restrictions on the sale before they could purchase it? We think not.

Mr. Webster defines the word "generally" as follows:

> 1. In general; commonly; extensively, though not universally; most frequently.
>
> 2. In a general way, or in a general relation; in the main; upon the whole; comprehensively.
>
> 3. Collectively; as a whole; without omissions.

Certainly Green Streak is not being sold "extensively," "in the main" or "comprehensively."

And he defines the word "ordinarily" as follows:

> According to established rules or settled method; as a rule; commonly; usually; in most cases.

Nor is it sold according to "established rules."

We take it that if the Shell Oil Company had manufactured Green Streak and sold it direct to the consumer

up and down the streets and highways, but did not sell it to the dealer or service station operator at all, that it would be conceded that the product would not come within the contract in this case. If, therefore, the Shell Oil Company sees fit to sell it to the public direct, but in a very special and limited way to certain dealers and service station operators, that it cannot be said to come within the contract unless such sale is general and ordinary. We submit that the sale of the product has not approached any where near the degree that might be termed a general or ordinary selling to dealers and operators.

Counsel for appellant offered to prove a similar and limited and restricted sale up and down the Pacific Coast, but the Court declined to permit it (R. 172).

It is, therefore, the position of the appellant that the product does not come within the contract and that the Court erred in so finding.

The Trial Court seemed to think that the language of the contract defining the gasoline embraced within it was governed by the Ejusdem Generis Rule (R. 47-8). But the Learned Trial Court both misinterpreted and misapplied the rule. By this rule when general words follow an enumeration of persons or things by words of more particular and specific meaning, the more general words are not construed in their widest sense but are restricted to persons or things of the same general kind or class more specifically mentioned.

Black's Law Dict., p. 415;

Bouvier's Law Dict., p. 979.

But the language in the contract in question is not to be tested by any such rule. The first inquiry is whether

Green Streak comes within the description of gasoline being sold to the "dealer trade generally" or "ordinarily to service station operators." If it comes within that general definition then the inquiry is: Is it excepted by the exclusion clause, "All specially refined or blended gasolines sold by it for special purposes at an increased price or prices."

Obviously, not being sold "at an increased price or prices" it is not *specifically* excluded. Therefore, the sole question for determination is: *Does it come within the language of the contract?*

Now what would Mr. Polsky do if he could get this gasoline? The best evidence is what he *did* when he *did get it;* for he was able to purchase it for a short time under mandatory injunction issued preliminarily without notice by the State Superior Court before the cause could be transferred to the Federal District Court.

He marketed it under the name of "Skookum" and immediately proceeded to and did sell it to split pump accounts (R. 138). Thus he commenced the undermining of the whole marketing structure and policy of the Company. Control of the product and protection for the name of 3-Energy immediately becomes lost. Should the appellant be required to furnish this product to appellee, appellee can place it at once in those places where appellant will not, and dealers and operators with whom appellant has no contractual relationship and over whom appellant has no control are given carte blanche power to use the product scrupulously or unscrupulously and to the prejudice of the sale of main grade, 3-Energy.

II

SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN DECREED

(Specifications of Error 1, 2, 3, 12 and 13)

The fundamental principle involved is well expressed in the general rule that specific performance of contracts in relation to personal property will not be enforced.

This is absolutely true and admits of no exception if:

1. Complainant has an adequate remedy at law; or

2. The contract lacks mutuality; or

3. The complainant's hands are unclean—more aptly expressed, if the complainant is himself in default; or

4. There is doubt as to the complainant's right on the merits or the contract is indefinite or uncertain.

If any one of the above is true, then this decree must be reversed. *We will demonstrate that all are true.*

The same principles applicable to the decreeing of specific performance govern the matter of issuing mandatory injunctions.

Arizona Edison Co. v. Southern Power Co., 17 Fed. 2d 739;

Engemoen v. Rea, 26 Fed. 2d 576.

Concerning the reluctance with which mandatory injunctions will be granted by the Courts, it is said in 32 Corpus Juris at page 23:

> "However, mandatory injunctions will never be granted unless extreme or very serious damage at least will ensue from withholding that relief; and each case must of course depend on its own circumstances. Such injunctions will never be issued in doubtful cases, where they would operate inequitably

> or oppressively, where there has been unreasonable delay by the party seeking the injunction, where the injury complained of is capable of compensation in damages, or where enforcement will require too great an amount of supervision by the court."

And in 14 R. C. L. at page 317 it is said:

> "Although the existence of this power in a court of equity is generally recognized, it is not regarded with any considerable degree of favor. Courts are reluctant to exercise it, and they act with caution and only in cases of necessity."

Mr. Pomeroy in his 4th Edition, Vol. 4, Sec. 1402, says:

> "The doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality."

Furthermore, when purely private controversies obtain and the case involves nothing effected by a public interest, a greater reluctance also is expressed.

In *Arizona Edison Co. v. Southern Sierras Power Co.*, 17 Fed. 2d 739, this Court said (p. 741):

> "Although the general rule of equity practice has been relaxed in cases in which public interests were so far involved as to be found of controlling importance, and of such a nature as to demand the enforcement of similar contracts (citing cases), it is believed that in no instance has specific performance been decreed of contracts such as this, where, as here, public interests were in no way imperiled, and no principle of public policy prevented the relegation of the plaintiff to his legal remedies."

The Supreme Court of Washington said in *Cahalan Inv. Co. v. Yakima*, 193 Pac. 210:

"To conduct a private business is not the function of a Court of Equity."

A

THE COMPLAINANT'S REMEDY AT LAW IS ADEQUATE

1

It will be conceded, or at least not questioned, that the appellant is solvent and readily able to respond in any amount by way of damages should the appellee at any time be found entitled thereto.

This case is very similar to the recent case of *LeMoyne Ranch v. Agajania* (Dist. Ct. of Appeals of Cal., hearing denied by Supreme Court), 8 Pac. 2d 1055. There the contract was one to sell and purchase garbage. In that case the trial court made a finding that it would be impossible for the complainant to compute or ascertain his damages to his business from inability to procure the garbage and that he would lose profits ascertainable only with extreme difficulty. The appellate court said (1056):

> "It was the claim of the plaintiff that if it was compelled to purchase a substitute for the garbage that its damages would be high. As the contract between the plaintiff and defendants was a simple contract to buy and sell, a breach by the defendants would authorize the plaintiff to sue for damages and such damages are fixed by the statute. Civ. Code, Secs 3354 and 3355. Therefore the plaintiff had a plain, speedy, and adequate remedy at law."

and (1057):

> "If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys recovered by action the vendee can buy in

> the open market property of the same character as that contracted for, if the vendor is in fault."

Other California decisions are quoted from therein and among them *McLaughlin v. Piatti*, 27 Cal. 451, which involved a sale of 500 head of cattle and wherein it was pointed out that the remedy was an action for damages.

In *Emerzian v. Asato*, 137 Pac. 1072, which involved a contract to purchase and sell oranges, it was said:

> "There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation. Civ. Code, Sec. 3387. And where the breach of a contract to transfer personal property can be thus compensated, an injunction cannot be granted to prevent the breach."

And, quoting from Pomeroy, as follows:

> "In general a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels because there is not any specific quality in the individual articles which gives them special value to the contracting party, and their money value recovered as damages will enable him to purchase others in the market of the like kind and quality."

Continuing, the Court said:

> "If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys recovered by action the vendee can buy in the open market property of the same character as that contracted for, if the vendor is in fault."

and

> "We cannot see that this case is any different from that where a farmer agrees to sell, but afterwards refuses to deliver, a certain number of tons of alfalfa

hay or other product of his farm of which there is an abundance to be purchased in the open market. In such a case we do not think it would for a moment be contended that the vendee could go into an equity court and restrain this farmer from selling his hay to some other person, compel him to irrigate or otherwise care for it, and bale and deliver it to the vendee at some future time."

Richfield Oil v. Hercules Gasoline Co., 297 Pac. 73, it was said (76):

"Concluding, as we must, that the contract in suit did not convey any interest in the real property, but that it was merely a contract to sell personal property, it necessarily follows that plaintiff is not entitled to equitable relief, because (1) it has an adequate remedy at law; and (2) the contract is not subject to specific enforcement."

In *Clark v. Rosario*, 176 Fed. 180, it was said (185):

"The first and insuperable obstacle to the affirmance of the decree appealed from is that the aggrieved party brought its suit in a court of equity to enforce the specific performance of a written contract, which contract showed upon its face, as the court below expressly held, that for its breach by the appellant and his associates the appellee should not be entitled to a specific performance of it, but should be limited to a stipulated sum as damages of $100,000. Under such circumstances, the only appropriate tribunal for the recovery of that money demand was a court of law. It did not come within the jurisdiction of a court of equity."

Mr. Justice Holmes, speaking for the United States Supreme Court, said in *Javierre v. Central Altagracia*, 54 Law Ed. 859, 217 U. S. 502, which case involved a contract to deliver sugar cane (861):

"The doubt as to the relief granted below is more serious, and, in the opinion of the majority of the

court, must prevail. According to that opinion, a suit for damages would have given adequate relief, and therefore the appellee should have been confined to its remedy at law."

In *Rutland Marble v. Ripley*, 19 Law Ed. 955; 10 Wall 339-363, it was said (963):

> "If he has any claim to damages for a breach of the contract, it must be asserted at law, and there his remedy is complete."

In *Seattle v. Puget Sound*, 284 Fed. 659, this Court said (663):

> "Again, it would seem that the remedy given by the state statute in the form of an action against the city to compel the setting aside of the fund and the payment of the principal and interest when due is a full, complete, and adequate one under the circumstances."

Warren v. Block (W. Va.), 102 S. E. 672, was a suit to enforce specific performance by injunction of a contract to furnish coal. It was said (673):

> "Ordinarily courts of equity will not enforce contracts for the purchase or the sale of personal property to be used for purely commercial purposes, the remedy at law for damages for a breach of such contracts being regarded generally as complete and adequate. There is hardly any article of commerce that is more easily obtained in the open market than coal. It is true plaintiff alleges that it made diligent effort to buy other coal of similar quality to that contracted for, and had not been able to do so; but this is denied in the answer, and the abundance of the product itself discounts the averment. That plaintiff may not have been able to buy coal from the producers to whom it applied does not show that it cannot do so in a reasonable time by applying to others. The coal contracted for is not shown to be of peculiar quality and different from coal produced

> from other mines in the same vicinity. Coal is abundant, and if plaintiff is willing to pay the price it can get it."

and

> "All the coal capable of being produced by the numerous coal mines in the vast coal region in the northern part of this state certainly was not sold, so that the amount of 50,000 tons could not have been obtained by plaintiff to take the place of that it had contracted for, between May 1st when the contract was made, and October 31st when this suit was brought. A case where a plaintiff's damages for a breach of contract can be ascertained more certainly and definitely than in the case here presented can scarcely be imagined."

Another coal case is *Consolidated Fuel Co. v. St. Louis S. W. Ry. Co.* (8th C.), 250 Fed. 395. It was there said (399):

> "We have been unable to find any authority that would allow a common carrier to go into a court of equity to obtain specific performance of such a contract as is involved in this action. To take jurisdiction in equity of the case made by the complaint would be to destroy all distinction between actions at law and in equity. If we shall take jurisdiction in this case, and specifically enforce a contract for the sale and delivery of coal, where could we stop. The next contract presented for us would be for the sale and delivery of engines, for the sale and delivery of railroad ties, for the sale and delivery of cars, or for the sale and delivery of a thousand other articles, which go to make up the equipment of a railroad. The contract price of coal is fixed; the market price of coal and cost of transportation is easily shown; why should equity assess the damages?"

The Supreme Court of Washington denied the right to enforce a contract to furnish heat in *Cahalan Inv. Co. v.*

Yakima, 193 Pac. 210, because of adequacy of the legal remedy, saying (212):

> "A court of equity will not ordinarily specifically enforce the performance of a private contract where the aggrieved party has an adequate remedy at law. Here we think there is such an adequate remedy. The respondent can maintain an action at law in damages for a breach of the contract. The argument advanced against this is the difficulty of making proofs of the actual loss. But the facts present nothing unusual in this respect. The contract was breached when the appellant refused to perform. There can be but one breach, and the respondent now has the right to recover in a single action all the damages it has suffered or will suffer by reason of the breach."

See also:

Duvall v. White, 189 Pac. 324;

Tenn. Elec. Power Co. v. White Co., 52 Fed. 2d 1065.

The following is taken from 58 Corpus Juris at 1034:

> "While statutes in some jurisdictions authorize specific performance of contracts for the sale of personal property in accordance with the general rules, specific performance of a contract for the sale of personal property will not ordinarily be granted because there is an adequate remedy at law, as in action for damages for breach of contract. So a contract to convey chattels having a market value cannot be specifically enforced unless damages in lieu thereof would be inadequate, and a court of equity therefore will not, unless there is some special reason, specifically enforce a contract for the sale of ordinary articles of commerce, which can at all times be brought in the market such as:
>
> BARROOM FIXTURES: (*Meehan v. Owens*, 196 Pa. 69, 46 A 263).
>
> CATTLE: (*Kane v. Luckman*, 131 Fed. 609; *McLaughlin v. Piatti*, 27 Cal. 451).

COAL: (*Consolidated Fuel Co. v. St. Louis Southwestern R. Co.*, 250 Fed. 395, 162 C. C. A. 465; *George E. Warren Co. v. A. L. Black Coal Co.*, 85 W. Va. 684, 102 S. E. 672, 15 A. L. R. 1083; *Fothergill v. Rowland*, L. R. 17, Eq. 132).

CORN: (*G. C. Outten Grain Co. v. Grace*, 239 Ill. A 284).

COTTON: (*Block v. Shaw*, 78 Ark. 511, 95 S. W. 806).

LUMBER: (*Dorman v. McDonald*, 47 Fla. 252, 36 S. 52; *Neal v. Parker*, 98 Md. 254, 57 A 213; *Diamond Lumber Co. v. Anderson*, 216 Mich. 71, 184 N. W. 597; *Flint v. Corby*, 4 Grant Ch. (Ont.) 45.

PIANOS: (*Steinway v. Massey*, 198 Kentucky 265, 248 S. W. 884.

SAUERKRAUT: (*A. G. Lehman Co. v. Island City Pickle Co.*, 208 Fed. 1014, 1017).

WHISKEY: (*Langord v. Taylor*, 99 Va. 577, 39 S. E. 223).

USED CARS:(*Gallagher v. Studebaker Corp.*, 236 Mich. 195, 210 N. W. 233).

OR AN EXISTING BUSINESS: (*Flechs v. Richie*, 91 Okla. 95, 216 P 644.

AND STOCK IN TRADE: (*Carolee v. Handelis*, 103 Ga. 299, 29 S. E. 935; *Flechs v. Richie*, 91 Okla. 95, 216 P 644)."

See extensive annotation in L. R. A. 1918 E, pp. 597-634.

2

Upon breach by the seller of the contract to sell it becomes the duty of the buyer to endeavor to procure the commodity elsewhere and the amount of his damages is the difference between the contract price and the price he is obliged to pay in the market. The Washington Uniform

Sales Act (Sec. 5836-67 of Rem. Comp. Stat. of Washington, 1927 Supp.), provides as follows:

> "Action for Failing to Deliver Goods.
>
> 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
>
> 2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.
>
> 3. *Where there is an available market for the goods in question, the measure of damages*, in the absence of special circumstances showing proximate damages of a greater amount, *is the difference between the contract price and the market or current price of the goods, at the time or times when they ought to have been delivered*, or, if no time was fixed, then at the time of the refusal to deliver."

Loewi v. Long, 76 Wash. 480; 136 Pac. 673;

Lilly v. Lilly Bogardus Co., 39 Wash. 337; 81 Pac. 852;

Pearce v. Puyallup Co., 117 Wash. 612; 201 Pac. 905;

Sussman v. Gustav, 116 Wash. 275; 199 Pac. 232;

Menz Lbr. Co. v. McNeeley Co., 58 Wash. 223; 108 Pac. 621;

Coast Fir Co. v. Puget Sound Co., 117 Wash. 515; 201 Pac. 747.

The complainant ignored the true, legal and accurate method by which to measure its damages.

No evidence was offered as to the market price of a third structure gasoline. There can be no presumption that another third structure gasoline would have cost complainant more than Green Streak. *And if complainant*

could purchase third structure gasoline at a better price THEN IT SUFFERED NO DAMAGE WHATEVER.

Not the slightest bit of evidence was offered by the complainant that it sought to procure third structure gasoline elsewhere. The complainant entirely disregarded its legal duty in the matter. The only suggestion of the point found in the record is a question by the Court and the answer (R. 127):

> "THE COURT: Were you able to supply yourself, or anybody, with cheap gasoline of the same standard and form?
>
> "A. No, sir, I am not."

But why he was not able to buy some other gasoline is not explained. Gasoline is ever-present, everywhere, universal. Many companies are anxious to sell it—wholesale, retail, any way; yet the complainant makes no effort to procure the gasoline and follow his legal remedy. Perhaps he could not have obtained "Green Streak" elsewhere, but the evidence in this case discloses that many other companies are selling a third structure gasoline (R. 162, 174). There is plenty of it on the market.

There is no evidence and certainly no presumption that any other third structure gas is not substantially the same as Green Streak.

As was said in *Emerzian v. Asato*, supra:

> "We cannot see that this case is any different from that where a farmer agrees to sell, but afterwards refuses to deliver, a certain number of tons of alfalfa hay or other product of his farm of which there is an abundance to be purchased in the open market."

And in *Warren v. Black*, supra, it was said:

> "There is hardly any article of commerce that is more easily obtained in the open market than coal."

And in *Consolidated Fuel Co. v. St. Louis S. W. Ry. Co.*, supra, it was said:

> "If we shall take jurisdiction in this case, and specifically enforce a contract for the sale and delivery of coal, where could we stop? The next contract presented for us would be for the sale and delivery of engines, for the sale and delivery of railroad ties, for the sale and delivery of cars, or for the sale and delivery of a thousand other articles, which go to make up the equipment of a railroad. The contract price of coal is fixed; the market price of coal and cost of transportation is easily shown; why should equity assess the damages?"

Having a legal remedy and not having endeavored to pursue it it is difficult to understand why complainant should be permitted to resort to equitable relief.

3

Instead of pursuing its legal remedy, complainant met the situation by selling the 3-Energy or main grade of gasoline at the price of third structure. This was not a *legal* measure, but nevertheless it was *accurate* in determining *the damages sought to be proved thereby.*

Mr. Polsky said (R. 127-8):

> "I am selling today my first quality gasoline at the cheapest price, at a very great loss to me."

and

> "A. No, sir, *I am losing today about two cents a gallon.*
>
> "THE COURT: So it is a difference between a half cent profit and two and a half cents?

"A. That's right.

"Q. *You are losing that on this gasoline that you are selling at the reduced price in order to meet the competition?*

"A. Yes, sir."

Why, therefore, should complainant be entitled to equitable relief when there is measured accurately, day by day, the damages sought to be proved, *and the appellant is solvent and able to respond?* He said positively his loss was two cents per gallon.

There is no insurmountable difficulty in multiplying the number of gallons of "Aviation" sold at the price of Green Streak at two cents a gallon in an endeavor to arrive at the damage claimed! APPELLEE ITSELF ESTABLISHED THE ADEQUACY OF ITS LEGAL REMEDY BY PROVING ITS DAMAGES.

4

Appellee claims that the two cents per gallon does not fully compensate it for its damages and that it suffers other damages in addition. Such additional damage it claims is in loss of prestige for the name of the main grade of gas it has been selling and loss of patronage.

But there are several answers to this proposition.

The first is that had appellee sought its legal remedy and purchased a third structure gasoline elsewhere it would not be disturbing the name of its main grade or interfering with its sale.

The second is, that it did not prove any loss of patronage. Quite on the contrary. Although it had been able to procure but little Green Streak between July 2nd and Septem-

ber 6th, when this case was tried, its business had not fallen off a bit. He said: "The actual volume of my business has not fallen off" (R. 135).

He claimed inability to comply with dealer contracts, but *not a single contract was introduced in substantiation of any liability on appellee's part to furnish a third structure gasoline to anybody. Not a single dealer or service station operator of appellee's was put on the stand* to testify that he wanted Green Streak, needed it, had demanded it or could not get it from appellee. Indeed, the futility of appellee's position in this regard is seen when it is observed in the record that an attempt was made by appellee to offer contracts between *Shell Oil Company and Shell's dealers*. And then the offer to introduce the contracts was voluntarily withdrawn (R. 133-4).

The next answer is that *there is no other damage than the two cents per gallon*, if any. If appellee is entitled to this gas and cannot get it, then it has placed itself in a most advantageous position. *It is selling its better grade of gasoline at a cheaper price and charging the loss up to appellant.* Appellee stands in a way to increase its business many-fold. For if appellee has built up a patronage of "Aviation," appellee's trade name for 3-Energy, and is now selling *it* at the price of a cheaper gas—appellee should be in a position to attract the automobile traffic of the world to its doors. For who would not buy Packard automobiles at the price of Fords; jems at the price of pebbles; genuine silk at the price of cotton?

But the last, though not the least answer to the suggestion that ruination faces its business is that so far as appellee is concerned it will soon be at an end through

expiration of the contract. So that under the most liberal theory its damages could only be the net profit it could make in the ordinary operation of its business during the balance of the period the contract has to run. The contract will expire February 28, 1933 (R. 137).

But under the terms of the contract appellee's purchase of gasoline between December 15th and December 15th from year to year shall not exceed 4,000,000 gallons. On September 6th when the case was tried appellee had purchased 3,200,000 and had but 800,000 gallons left, to which it was entitled. The undisputed testimony shows that appellee was purchasing at the rate of about 400,000 gallons per month so that on November 1st, or thereabouts *it could no longer obtain any gasoline from appellant* and would not be able to until December 15, 1932, and then only from December 15th until February 28, 1933.

The decree provided for this (R. 78).

Mr. Fisher, the Northern Division Manager, testified that he had warned Mr. Polsky on several occasions that he was running up to his maximum and that his available supply would end some substantial period prior to December 15th (R. 168).

Appellee's damages, if any, during this small remaining period can be accurately measured. Damages, if any, from the inability to obtain Green Streak is of minor consequence when the short period of dealing between the parties is considered.

B

THE CONTRACT LACKS MUTUALITY

In *Pantages v. Gruman*, 9th Cir., 191 Fed. 317, it was said (323):

> "It is a fundamental principle that specific performance of a contract will not be decreed unless it can be rendered obligatory upon both parties. In other words, the remedy must be mutual; otherwise, it cannot be invoked. (Citing cases). Nor, it is held, will the remedy avail unless both parties at the time the contract is executed have the right to resort to equity for its specific enforcement. *Norris v. Fox, et al.* (C. C.) 45 Fed. 406. The principle has been carried into the statutes of California, and is enforced by its courts. *Pacific Electric Ry. Co. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac. 623."

In *Javierre v. Central Altagracia*, 54 Law Ed. 859; 217 U. S. 502, it was said (861):

> "There is, too, a want of mutuality in the remedy, whatever that objection may amount to, as it is hard to see how an injunction could have been granted against the appellee had the case been reversed."

Rutland Marble v. Ripley, 19 Law Ed. 955, 10 Wall 339-363, was a case involving the sale of marble from a quarry. The United States Supreme Court said (961-962):

> "Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable

> of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

Specific performance of a contract to deliver coal was sought in *Black Diamond Co. v. Jones Coal Co.* (Ala.), 76 So. 42, and it was said (43-44):

> "It has been frequently held by this court that mutuality in the equitable remedy was of the essence of the right to specific performance of the contract.'

and

> "The contract here in question provides for the delivery of coal to the complainant and contemplates it shipment by the complainant and a monthly credit extended. Had coal declined in price, rather than advanced, it is quite clear that respondent could not have maintained a bill requiring the complainant to accept the coal, and pay for the same at the price agreed upon, but his remedy would have been an action at law."

In *Pullman Palace Car Co. v. Tex. Ry. Co.*, 11 Fed. 625, it was said (630):

> "No such decree or order should be rendered when there is not a mutuality of remedy between the parties, obtainable from the court."

The following statement was made in *Engemoen v. Rea*, 26 Fed. 2d, 576 (578):

> "The general rule is that a court of equity will not enjoin a breach of contract which is executory on both sides where the remedy is not mutual. Where, therefore, the obligation imposed by the contract upon the plaintiff is of such a nature that a court could not specifically enforce it against him at the instance of the defendant, a court of equity will ordinarily deny injunctive relief to the plaintiff against a violation of the contract by the defendant,

on the ground of want of mutuality of remedy." (See cases therein cited).

Many cases are cited and reviewed in the case of *General Electric Co. v. Westinghouse Electric Co.*, 144 Fed. 458, wherein it was said (462):

> "Should the General Electric Company violate the agreement in the respect mentioned on its part the Westinghouse Company would be compelled to resort to an action at law for damages. If each company is relegated to its remedy at law for a violation of the agreement they stand on an equality, but if not the one has an advantage over the other. If the plaintiff company may restrain defendant company from making and selling these controllers in violation of its agreement, the defendant company ought to have a corresponding right to compel the plaintiff company to make and furnish to it controllers pursuant to the agreement. In short, there is no mutuality of remedy, and, in such cases, specific performance is not decreed."

Certainly this contract lacks mutuality. Suppose appellant considered that Green Streak came within the contract and appellee did not and appellant attempted to force appellee to purchase the cheaper grade as well as the main grade of 3-Energy. Appellee's first answer in a court of equity would be, "There is no provision as to the amount of such gasoline I should take, and I will therefore take one gallon per month and the balance in 3-Energy" or "I will take one gallon of 3-Energy per month and the balance in Green Streak." A court of equity would not amend or rewrite the contract to fix the respective amounts of both products that appellee should take. The appellant therefore, would be without equitable remedy.

But the decisive answer is that if appellee declined to buy it, no court could operate its business in such a way as to compel it to take certain cash and pay it out for Green Streak. Appellee must be insolvent if its claims are true. It is claimed that it cannot operate two weeks without Green Streak (R. 132). How then could appellant have turned the tables on appellee if the situation had been reversed?

But the remedy of a seller is always in law and is definitely fixed by statute and is accurate.

Sec. 5863 of Remington's Compiled Statutes, 1927 Supp. (63):

> "(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods, according to the terms of the contract or the sale, *the seller may maintain an action against him for the price of the goods.*
>
> "(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, *the seller may maintain an action for the price*, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.
>
> "(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 5836-64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer.

Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

Sec. 5836 of Remington's Compiled Statutes, 1927 Supp. (64):

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, *the measure of damages is*, in the absence of special circumstances showing proximate damage of a greater amount, *the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.*

"(4) If while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

A court of equity not being open to appellant had appellee declined to perform, it is not open to appellee in the event of appellant's nonperformance.

C

A SUBSTANTIAL DOUBT AND UNCERTAINTY EXISTS AS TO WHETHER THE PRODUCT IN QUESTION COMES WITHIN THE CONTRACT

If there is any doubt as to the complainant's right to the product in question, or any indefiniteness, or uncertainty with reference to the terms of the contract whether the product comes within it, specific performance will not be decreed.

In *Minnesota Tribune Co. v. Associated Press*, 8 Cir., 83 Fed. 350, Mr. Justice Thayer said (356-357):

> "But, waiving that question, it must be borne in mind that it is a well-established rule that courts of equity will not undertake to enforce an agreement if any of its provisions are so far indefinite or ambiguous as to render it uncertain what were the intentions of the parties, and what obligations they intended to assume. A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which a complainant seeks to enforce is vague or uncertain, a court of equity will not interfere, but will leave him to his legal remedy."

The Court said in *Moyer v. Butte Miners' Union*, 246 Fed. 657 (662):

> "It requires no extended citation of authority to sustain the rule that one who seeks to enforce the specific performance of a contract must establish very clearly and to the entire satisfaction of the court the existence of the contract and the terms thereof."

And in *Pioneer Reduction Co. v. Beedle*, 260 Fed. 801 said (807):

"We think it unnecessary to cite the many authorities that might readily be cited to show that the court below did not err in holding that in such a case it is essential that the evidence be clear and satisfactory, both as to the existence of the contract sought to be enforced, as well as to its terms, and in accordingly denying the decree for specific performance thereof."

Touching specific performance, Mr. Justice Harlan said in *Hennessy v. Woolworth*, 128 U. S. 438 (442):

"It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt whether the party against whom relief is asked in fact made such an agreement."

In *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 37 Law Ed. 749, it was said (755):

" 'The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy.' 15 U. S. 2 Wheat, 336, 341 (4: 253, 255). So this court has said that chancery will not decree specific performance, 'if it be doubtful whether an agreement has been concluded, or is a mere negotiation,' nor 'unless the proof is clear and satisfactory, both as to the existence of the agreement, and as to its terms.' "

The Supreme Court of Washington said in *Cahalan Inv. Co.*, 193 Pac. 210 (212):

"It is a general rule that a decree for the specific performance of a contract will not be granted unless the evidence of the making of the contract is clear and convincing (citing cases), and we are not persuaded that the evidence here satisfies the rule. But we think we should refrain from a discussion of the

evidence or from expressing the deductions and conclusions we draw therefrom. The conclusion we have reached in the case as a whole leaves open to the respondent the right to maintain an action at law as for a breach of the contract, and any discussion of the evidence on our part could well prejudice one or the other of the parties in the trial of such an action. *It may be well to say, however, that a distinction exists in the degree of proof required to establish a contract when the action is one to recover in damages for a breach of the contract and when it is one to enforce a specific performance of the contract. In the one case the plaintiff may recover if he shows the existence of the contract by a preponderance of the evidence (provided, of course, his evidence makes a prima facie case), while in the other he must satisfy the court of the existence of the contract by clear and convincing evidence.*" (Italics ours).

See also *Ellis v. Treat*, 236 Fed. 120.

The foregoing cases establish the rule that the complainant's case must be proved with greater certainty if specific performance is sought, rather than a legal remedy. It is a wise rule. And if doubt exists under such measurement of the proof, then the remedy should not be granted.

It seems to us that when it is established beyond question that not a single-pump dealer, not a split pump dealer, and but few 100% dealers (and then only under special circumstances) can purchase this commodity that it is not within the express terms of the contract. But if it be found that it is, so much doubt must attend the finding that it should be resolved as a case not entitled to equitable relief, but rather to disposition in the usual manner by way of damages.

D

COMPLAINANT IS ITSELF IN DEFAULT

If the complainant is himself in default, then he does not come into equity with clean hands and cannot urge performance on the part of the other party.

In *Rutland Marble v. Ripley*, 19 Law Ed. 955, 10 Wall 339-363, the U. S. Supreme Court said (961):

> "There are other objections, however, to a decree for a specific performance in this case which are more serious. Such a decree is not a matter of right. It rests in the sound discretion of the court and, generally, it will not be made in favor of a party who has himself been in default."

In *Cronin v. Moore*, 210 Fed. 239, this Court said (242):

> "Specific performance is not a matter or right. It rests in the sound judicial discretion of the court. Before it may be awarded, it is the substantial conditions of the contract. He must himself do equity, and must come into court with clean hands."

And repeated the language in *Ellis v. Treat*, 236 Fed. 120.

In *Elkhorn Coal Co. v. Kentucky River Coal Co.*, 20 Fed. 2d 67, it was said (71):

> "No one has a right in equity to enforce specifically a contract which he has in anticipation wrongfully and intentionally violated."

This rule is so well known and so firmly established that further elaboration of it is unnecessary.

Specification 13 (Assignment XVIII, R. 90, 177-180.

Default on the part of appellee was pleaded affirmatively in the answer (R. 40). And it was sought to be proved

at the time of trial that appellee had obtained possession of gasoline up to the sum of $47,390.91, without paying for it and over the objection of appellant, and the Division Credit Manager of the appellant was placed on the stand for that purpose. Objection was made and sustained, whereupon offer of proof was made and the trial court said: "That is something a court of equity is not concerned about." (R. 177-180).

If the complainant was in default and not doing equity then it was not in Court with clean hands and was not entitled to equitable relief. Certainly appellant should have been granted the right to show this.

In addition, the record shows affirmatively that appellee when it could get the gasoline would have used it as a sword to undermine and ruin the whole sales policy and marketing structure of appellant. It proceeded at once to sell Green Streak to those accounts to whom appellant would not sell it and who could not get it (R. 138). Of what value would appellant's contract be to it if by means of it appellee could immediately place the gasoline where appellant would not? The whole purpose in marketing and selling Green Streak would be lost if appellee had the ability and opportunity to pour it out in all those places from which appellant saw fit to withhold it in an endeavor to protect the name of 3-Energy and guarantee its sale, rather than that of the cheaper grade!

Such conduct on the part of appellee does not warrant equitable relief in its behalf.

III
OTHER ERRORS SPECIFIED

A
Refusal to Consider Written Acknowledgments

Specifications 10 and 11. (Assignments XIV and XV; R. 47, 90, 158-9, Defendant's Exhibit "A," R. 197).

In proving that the commodity was not sold "generally" and "ordinarily" it was important to establish the limitations and restrictions upon its sale. For this purpose it was sought to establish that no dealer could procure it without signing an agreement acknowledging certain things. The Assistant Division Manager was asked to testify to these limitations and to identify and prove copies of the written acknowledgments. The Court declined to hear the testimony and refused to admit the instruments, reserving ruling until conclusion of the cause when in his oral opinion he held them immaterial (R. 47).

We can see no reason why his testimony and these instruments were not material and *important* on appellant's theory of the cause. In so ruling the Court committed error and in rejecting them indicated a failure to properly understand the meaning of the contract and the theory of the defense.

B
Handling of Green Streak on the Pacific Coast Generally

Specification 9. (Assignment XVI; R. 90-172).

One of the questions for the Trial Court's determination was whether the commodity was sold generally to the dealer trade *in Seattle*. In determining the truth with

respect to *Seattle* it became an important circumstance as to whether it was sold generally on the Pacific Coast; whether it was or was not sold generally on the Pacific Coast was not a decisive factor and the proof with respect to it was not offered as determinative of the issue but as *corroboration* of the truth of the situation in Seattle.

For this purpose Mr. E. L. Miller, Vice-President of appellant, located in San Francisco, and fully conversant with the matter was interrogated, but the Trial Court declined to hear any of the testimony. This was error.

C

Testimony With Respect to Damage

Specification 6. (Assignments VI to XIX inclusive; R. 86, 127, 131).

This specification is covered by the discussion under heading II-A.

Damage was sought to be proved by the wrong rule.

D

Hearsay Testimony with Reference to Demands and Threats and Concerning Written Contracts

Specifications VII and VIII and XIV. (Assignments 10 and 11 and 19; R. 89, 131-3).

The witness Polsky was permitted to testify that "threats" and "demands" had been made upon him touching his inability to deliver Green Streak to his own dealers to whom he was under contract, and as to how his dealers "felt" about the matter.

This was hearsay testimony of the boldest kind. This testimony became a part of the record and subject to

being accepted as true. No opportunity was given to appellant's counsel to cross examine such parties.

Appellee had no right to contract for the delivery of Green Streak until he had established his ability to procure it.

If it had made any such contracts by which it was bound, then those contracts themselves were the best evidence.

The whole fabric of appellee's proof was most vague, uncertain and indefinite and yet vicious and dangerous because it created an impression of fact and truth by suggestion, inference and hearsay testimony without even making a prima facie case by competent evidence.

If there was any truth in the claim that appellee had contracts outstanding by parties who had made threats or demands, then the proof of it by the best evidence would have been a simple matter.

IV
CONCLUSION

It is respectfully submitted that when all the evidence is fairly considered Green Streak does not come within the contract, but that if it does then the extraordinary remedy of specific performance has been exerted in a case little deserving of it because it involves a simple contract to buy and sell a common commodity. No attempt has been made to procure it on the open market. If it could be purchased cheaper in the open wholesale market, then no damages whatever have been sustained by the complainant. The damages sought by the evidence to be

proved have been measured accurately and the appellant is able to respond. It is one of many similar cases where the legal remedy has been held adequate.

Appellant prays that the decree be reversed and the cause dismissed.

Respectfully submitted,

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